Filed 3/16/10 P. v. Millbrook CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

VICTORIA ELIZABETH MILLBROOK,

Defendant and Appellant.

F057187

(Super. Ct. No. 1228766)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Stanislaus County. Timothy W. Salter, Judge.

Cathy A. Neff, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Kathleen A. McKenna and Leslie W. Westmoreland, Deputy Attorneys General, for Plaintiff and Respondent.

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*Before Wiseman, Acting P.J., Dawson, J. and Kane, J.

Following a jury trial, Victoria Elizabeth Millbrook (appellant) was found guilty of forgery (Pen. Code, § 470, subd. (d))[1] and receiving stolen property (§ 496, subd. (a)). The allegation that appellant had previously been convicted of two or more felonies (§ 1203, subd. (e)(4)) was found true. The trial court sentenced appellant to a two-year term on the forgery conviction and a concurrent two-year term on the stolen property conviction. The trial court suspended sentence and committed appellant to the California Rehabilitation Center.

Appellant's sole contention on appeal is that the trial court violated section 654 when it imposed separate sentences on both counts. We disagree and affirm.

FACTS

In late December of 2006, appellant and Shaun Donahoe moved into an apartment as roommates. Donahoe had a checking account at Farmers and Merchants Bank. She had both temporary checks she received when she opened the account plus a packet of checkbooks which she kept either in or near her unlocked computer desk. Appellant, who had access to Donahoe's bedroom, stole two checks from an unused checkbook and approximately nine temporary checks.

Appellant had a checking account at Umpqua Bank. On May 3, 2007, appellant deposited check No. 1163, drawn on Donahoe's account, in the amount of $1,475.23 into her own account through the ATM (automated teller machine). The check was made out to appellant and signed with Donahoe's name. Donahoe did not write the check or give appellant permission to write, sign, or deposit it.

On May 8, 2007, appellant did the same with one of Donahoe's temporary checks, this time in the amount of $1,923.47, again through the ATM. The check was signed with Donahoe's name, but Donahoe did not sign it or give appellant permission to possess, sign, or deposit the check.

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[1] All further statutory references are to the Penal Code unless otherwise stated.

Appellant admitted to police that she had Donahoe's checks and that she deposited them into her own account. According to appellant, the checks were payment or repayment for items from Donahoe to appellant.

Todd Heaney, who had known appellant for approximately four years, testified that he was present at appellant and Donahoe's apartment one time between April and June of 2007 when Donahoe gave appellant a check. Appellant's sister was also present. Heaney saw the check, but could not see any writing on it. Heaney then rode with appellant to the bank where she deposited several checks into her account, including the check Donahoe had given her. But Heaney admitted that he did not actually see appellant deposit the checks, and he did not know whether she had entered the bank or used the ATM.

Appellant's sister, Loretta Tonkinson, testified that she knew Donahoe through appellant, and that she was present on two occasions when Donahoe gave appellant a check. She did not recall when the checks were given, but the first time, when Donahoe handed appellant a check, she jokingly grabbed it and asked appellant what she was going to buy for her with it. Tonkinson testified that the check, for around $1,400, was signed by Donahoe and made out to appellant.

On the second occasion, Tonkinson stated that she, appellant, and Heaney were in the living room when Donahoe handed appellant a check. Tonkinson saw the check briefly and could see that the check was made out to appellant for around $1,900. Tonkinson, Heaney, and appellant then went to the bank, but Tonkinson did not recall whether appellant entered the bank or used the ATM. Tonkinson thought the two incidents occurred a couple of weeks apart in April or May of 2007.

DISCUSSION

The Trial Court Was Not Required to Stay the Sentence Pursuant to Section 654

Appellant argues the trial court violated section 654,[2] which prohibits punishment for two offenses arising from the same act or from a series of acts constituting an indivisible course of conduct (*People v. Latimer* (1993) 5 Cal.4th 1203, 1216; *People v. Harrison* (1989) 48 Cal.3d 321, 335), by imposing separate sentences for both check forgery and receiving stolen property. According to appellant, the offenses were committed to achieve a single criminal objective—"to defraud Donahoe by converting the stolen checks into monetary gain for appellant's benefit." We disagree.

> "The test for determining whether section 654 prohibits multiple punishment has long been established: 'Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.' [Citation.]" (*People v. Britt* (2004) 32 Cal.4th 944, 951-952.)

"If, on the other hand, defendant harbored 'multiple criminal objectives,' which were independent of and not merely incidental to each other, [the defendant] may be punished for each statutory violation committed in pursuit of each objective, 'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.' [Citation.]" (*People v. Harrison, supra*, 48 Cal.3d at p. 335.) "'The principal inquiry in each case is whether the defendant's criminal intent and objective were single or multiple.' [Citation.] 'A defendant's criminal objective is "determined from all the circumstances …."'" (*In re Jose P.* (2003) 106 Cal.App.4th 458, 469.)

Whether section 654 applies in a given case is a question of fact for the trial court, which is vested with broad latitude in making its determination. (*People v. Hutchins*

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[2]Section 654, subdivision (a), provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential terms of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other."

(2001) 90 Cal.App.4th 1308, 1312; *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1466.) Its findings must be upheld on appeal if there is any substantial evidence to support them. (*Hutchins*, at p. 1312; *Herrera*, at p. 1466; *People v. Nichols* (1994) 29 Cal.App.4th 1651, 1657.) "We review the trial court's determination in the light most favorable to the respondent and presume the existence of every fact the trial court could reasonably deduce from the evidence." (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143; see *People v. Cleveland* (2001) 87 Cal.App.4th 263, 271 [trial court's finding of "separate intents" reviewed for sufficient evidence in light most favorable to judgment].)

Substantial evidence supports the trial court's conclusion that appellant's receipt of stolen property and the check forgery were separate and distinct offenses. The offense of receiving stolen property required proof the defendant possessed stolen property, knowing the property was stolen. (*In re Anthony J.* (2004) 117 Cal.App.4th 718, 728; Judicial Council of Cal. Crim. Jury Instns. (2009) CALCRIM No. 1750.) The additional fraudulent intent to sell the property or otherwise use it for financial gain is not an element of the offense. (See *People v. Osborne* (1978) 77 Cal.App.3d 472, 476; *People v. Wielograf* (1980) 101 Cal.App.3d 488, 494.) Appellant was guilty of receiving stolen property when she acquired the checks from Donahoe without her permission. Appellant's objective in committing this offense was presumably to keep the checks from being returned to Donahoe.

The offense of check forgery, as charged in the case, required proof the defendant forged checks with the intent to defraud "another person, either to cause a loss of money, or to cause damage to, a legal, financial, or property right." (CALCRIM No. 1904.) Thus, appellant committed check forgery at the bank when she filled out the checks, signed Donahoe's name to them, and deposited them into her account via the ATM.

That both crimes were purportedly part of a single, overall scheme—to fraudulently obtain financial gain by using the stolen checks—does not mean section 654 bars punishment for both crimes.

> "'Under section 654, "a course of conduct divisible in time, although directed to one objective, may give rise to multiple violations and punishment. [Citations.]" [Citations.] This is particularly so where the offenses are temporally separated in such a way as to afford the defendant the opportunity to reflect and to renew his or her intent before committing the next one, thereby aggravating the violation of public security or policy already undertaken.'" (*People v. Andra* (2007) 156 Cal.App.4th 638, 640 [punishment for both vehicle theft and identity theft not barred by § 654 even though purpose of identity theft was to facilitate vehicle theft two weeks later]; see *People v. Kwok* (1998) 63 Cal.App.4th 1236, 1253-1256 [separate punishment for two burglaries not barred by § 654 even though first burglary was committed to facilitate subsequent crimes]; *People v. Gopal* (1985) 171 Cal.App.3d 524, 531-532, 549-550 [consecutive sentences for bribery and possession of stolen property divisible in time not barred, although sole objective of offering bribe was to obtain stolen trade secret].)

The offense of receiving stolen property was completed before appellant went to the bank with the intent to commit check forgery. The trial court was entitled to conclude the separation in time between the crimes afforded appellant sufficient opportunity to reflect upon her initial crime and reconsider her course of conduct.

Thus, section 654 does not bar separate punishment for the two separate crimes.

DISPOSITION

The judgment is affirmed.